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No. 96-644

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FISCHBACH AND MOORE, INC.,

Petitioner,

—v.—

PACIFIC GAS & ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Contrary to the assertion of Petitioner Fischbach & Moore, Inc. ("Fischbach"), this case presents *no* question whatsoever concerning the availability of prejudgment interest in federal antitrust cases, as Respondent Pacific Gas & Electric Company ("PG&E") has not yet requested an award of prejudgment interest and neither court below has ever ruled that PG&E is entitled to one. Rather, the question presented is this:

Where bid-rigging conspirators are found liable for an illegal overcharge stemming from an antitrust violation, may the plaintiff recover treble damages for its actual costs to finance the overcharge?

Rule 29.6 Statement

Pursuant to Rule 29.6, respondent informs the Court that Pacific Gas & Electric Company has issued shares which are publicly traded in the United States. No other subsidiary or affiliate of PG&E is owned in part by anyone other than PG&E with the following exceptions:

Altresco Lynn, Inc.
Altresco, Inc.
Avoca Natural Gas Storage
BBB Generating Company
Beacon Gas Services, Inc.
Beale Generating Company
Berkshire Pittsfield, Inc.
Bowdoin Storage Services, Inc.
Caldera Enterprises, Ltd.
Caldera Generating Company, Ltd.
Carneys Point Generating Company
Cauca Valley (Bermuda), Limited
CCC Generating Company
Coastal Cryogenics Tankship Corporation
Compañia Samalayuca II, S.A. DE C.V.
Dabhol Generating Company, Ltd.
Dyna Makowski Power Company
ELEKTROGAZ Ventures Ltd.
First Oregon Land Corporation
Garnet Power Corporation
InterGen Pipeline Company, Ltd.
International Generating Company (Hong Kong) Limited
International Generating Company (U.K.) Limited
International Generating Company, Inc.
International Generating Company, Ltd.
J. Makowski (CBM), Ltd.
J. Makowski (Netherlands) B.V.
J. Makowski (Texas), Inc.
J. Makowski Associates, Inc.

J. Makowski Company, Inc.
J. Makowski Management Corporation
J. Makowski Pittsfield, Inc.
J. Makowski Services, Inc.
JMC (Storage), Inc.
JMC (U.K.), Ltd.
JMC Altresco, Inc.
JMC Avoca, Inc.
JMC Beacon, Inc.
JMC Bethpage, Inc.
JMC Caldas, Inc.
JMC Cauca Valley, Inc.
JMC Cayuta, Inc.
JMC Development Company, Inc.
JMC International, Inc.
JMC Iroquois, Inc.
JMC Northwest Ventures, Inc.
JMC Ocean State Corporation
JMC Pipeline Services Company, Inc.
JMC Portland (Investors), Inc.
JMC Selkirk Holdings, Inc.
JMC Selkirk, Inc.
JMC West Lynn, Inc.
JMCS I Holdings, Inc.
JMCS I Management, Inc.
Makowski (Clean Energy) Investors, Inc.
Makowski Northwest, Inc.
Makowski Selkirk Holdings, Inc.
MASSPOWER, Inc.
Meizhou Wan Generating Company, Ltd.
Northeast Gas Markets, Inc.
Northeast Gas, Inc.
Orchard Gas Corporation
OSP Finance Company
Pittsfield Partners, Inc.
Power Enterprises (Bermuda), L.P.
Power Enterprises Corporation Limited (Bermuda)

PPN Generating Company, Ltd.
PPN Mauritius Company
PPNG, Ltd.
Quezon Generating Company, Ltd.
Rocksavage Generating Company, Ltd.
Rocksavage Power Company, Ltd.
SAM II Equity Funding, LLC
SAM II Generating Company (Cayman), Ltd.
SAM II Generating Company (U.S.), Inc.
Selkirk Cogen Funding Corporation
Standard Pacific Gas Line Incorporated
Topaz Power Corporation
U.S. Generating (Canada) Ltd.
USGen Fuel Services, Inc.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PG&E respectfully requests that this Court deny Fischbach's petition for a writ of certiorari, seeking review of one aspect of the Ninth Circuit's unreported opinion in this case. A copy of the unreported opinion is attached to Fischbach's petition at App. 1a. The portion of that opinion as to which Fischbach seeks review appears at pages App. 16a-18a.

STATEMENT OF THE CASE

PG&E accepts petitioner's statement of the case with the following exceptions.

Mr. Avram Tucker, PG&E's damage expert, testified that a competitive price for the work performed would have been within a range no less than cost plus four percent and no greater than cost plus eight percent. (*See* App. 77a.) On that basis, he testified that the illegal overcharge would have ranged as high as $5,573,721 (App. 90a-91a), rather than the "approximately $4 million" stated by Fischbach. (Pet. at 2.)

More egregious, though not at all germane to the issue, is Fischbach's bold assertion that the jury voted "9-1 in favor of Fischbach." (Pet. at 2.) This assertion is unsupported by any record citation and there is none that would support such a statement since the jurors were never polled as to how, if at all, they each voted.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's argument simply assumes at the outset the proposition that "PG&E's finance costs are the equivalent of prejudgment interest." (Pet. at 4.) Neither court below was willing to engage in that supposition. The Ninth Circuit, quoting the district court, said:

> [PG&E's] [c]ost of capital is an out-of-pocket expense. *Prejudgment interest is not.* The latter accrues during the pendency of an action. The former flows directly from conduct upon which the action is based. PG&E's claim for cost of capital damages arises from [d]efendants' allegedly wrongful conduct, not from the fact that its recovery has been delayed by the pendency of this action.
>
> (App. 17a.) (Emphasis added.)

Accordingly, the Ninth Circuit determined that in the retrial of this action PG&E "should recover [its] finance costs, regardless of where [PG&E] got the funds" to pay for the illegal overcharge for electrical construction work at its Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). (App. 18a.)

The only other courts to consider the issue of recovering actual financing costs, Judge Lasker of the Southern District of New York in *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168, 180 (S.D.N.Y. 1989) (affirming its prior ruling in *Minpeco, S.A. v. Hunt*, 686 F.Supp. 420, 425-27 (S.D.N.Y. 1988), and Judge Alsop of the District of Minnesota in *United Power Ass'n, Inc. v. L.K. Comstock & Co., 1992-2 Trade Cas.* (CCH) ¶ 70,055 at p. 69,208 (D.Minn. Oct. 27, 1992),[1] issued opinions that are completely consistent with the Ninth Circuit and

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[1] *United Power Ass'n.* involved an identical bid-rigging conspiracy which included many of the defendants here, including Fischbach. 1992-2 Trade Cas. (CCH) ¶ 70,055 at p. 69,209.

district court here. Both distinguished actual financing costs incurred by a plaintiff well before the start of any litigation, such as out-of-pocket payments of interest on a construction loan, from the concept of "prejudgment interest," which is intended to substitute for economic gain that might have been achieved on the investment of the recovered damages, if the plaintiff had use of the money.

In its petition, Fischbach urges this Court to adopt an unprecedented exception to established antitrust jurisprudence: no court has ever limited the *actual costs* that an antitrust plaintiff may recover as damages in the manner advocated by Fischbach. Fischbach supports its argument by citing *solely* to cases denying recovery for conjectural lost investment opportunity and ignoring cases distinguishing such claims from legitimate claims for actual financing costs, such as out-of-pocket interest payments to lenders.

Fischbach's petition fails to recognize that the fact that the courts and Congress have severely restricted monetary awards for the lost opportunity to invest a recovery of funds wrongfully taken from a plaintiff does *not* mean that the courts and Congress intended to restrict the elements of the recovery itself. PG&E does not dispute Fischbach's assertion that in cases arising under the Sherman Act, the courts and Congress have limited awards for the lost opportunity to invest a recovery by restricting prejudgment interest awards to the period of time during which an action was actually pending and only to instances where the plaintiff can prove that the defendant has engaged in dilatory conduct during the litigation process.

But, a limitation on allowing recovery for a lost investment opportunity, no matter how severe the limitation or how great the missed investment opportunity, is still an entirely different matter than prohibiting a plaintiff from proving at trial that a defendant's conduct forced the plaintiff to incur increased financing costs by wrongfully inflating the amount of capital for which plaintiff had to obtain financing. A plain-

tiff, like PG&E, who pays a bid-rigged price for a large, capital intensive construction project, like Diablo Canyon, not only loses the illegal overcharge, but also incurs actual costs to finance the overcharge. On the other hand, a plaintiff who claims to have lost an opportunity to invest his recovery may well have been injured, as Fischbach points out (Pet. at 11), but not in the same way. He suffers an economic injury of sorts, but the injury does not result in actual finance costs. Rather, it is a lost opportunity for gain. Such an injury is less readily ascertainable, less tangible, more ephemeral, more conjectural and generally more difficult to prove. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2nd Cir. 1971) (prejudgment interest generally not awarded on unliquidated damages due to difficulty in ascertaining precise amount to be awarded). That the courts and Congress have determined that such awards should be severely limited does not even begin to suggest, much less prove, that they intended also to restrict a plaintiff's recovery for the actual expense of increased financing costs that a defendant has proximately caused. That is the precise point made by the two courts below, as well as the *Minpeco* and *United Power Ass'n* courts.

As explained below, nothing in the text of the prejudgment interest cases Fischbach cites and nothing in the legislative history of the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (1980) (hereinafter, "the 1980 Act"), or any other act, even remotely suggests that Congress or any court ever intended to exempt bid-riggers from liability for the added financing costs plaintiffs were forced to pay as a result of the bid-riggers' conspiratorial conduct. Fischbach's entire petition is meritless—it confuses non-recoverable lost investment opportunities with completely recoverable actual financing costs, such as out-of-pocket interest payments to third-parties.

I. THE CASE LAW FISCHBACH CITES IS COMPLETELY INAPPOSITE.

The practical issue presented by Fischbach's petition is whether in keeping with traditional authority on antitrust damages,[2] PG&E should be allowed to present evidence at a retrial of this action that it suffered actual financing costs as a proximate result of the defendants' bid-rigging conduct.[3] Citing a host of irrelevant Federal Tort Claims Act ("FTCA"), Age Discrimination in Employment Act ("ADEA"), RICO and other cases, including antitrust cases, that discuss whether a plaintiff can recover prejudgment interest, that is, lost investment opportunities (Pet. at 6-24), Fischbach argues that such claims are no different than PG&E's claim for actual financing expenses incurred as a direct result of bid-rigging. Fischbach cites no case, and PG&E knows of none, which so holds.

PG&E agrees with Fischbach that lost investment opportunity is not a traditional element of antitrust damages. However, the cases cited by Fischbach do not support a rule that excludes actual financing costs from the scope of antitrust damages. Indeed, the cases Fischbach cites are far off the point it tries to make:

- Fischbach's reliance on the Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), is completely inapposite. The source of a "no-interest

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[2] *See Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

[3] At this stage, of course, there has been no factual determination that PG&E actually suffered any increase in its financing costs on account of the bid-rigging. The issue Fischbach wants this Court to address is whether the Ninth Circuit was correct when it determined that PG&E should be given an opportunity to prove at retrial that its actual financing costs were increased due to the conspiratorial activity. (App. 18a.)

rule" there was the doctrine of sovereign immunity: "The no-interest rule is to the effect that interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest." *Id.* at 311. The issue was whether the government had waived sovereign immunity protection to allow claims for interest to be made in certain civil rights actions. *Id.* The instant action involves civil litigants.

Moreover, *Library of Congress* did *not* concern financing costs at all. The plaintiff in *Library of Congress* never financed anything.[4] Plaintiff merely sought to compensate his own attorney "for the money [his attorney] *could have earned had he been paid earlier and invested the funds.*" 478 U.S. at 313 (emphasis added.) PG&E is not making a claim for lost opportunity costs.[5]

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[4] Apparently, the plaintiff paid nothing to his attorney during the course of the litigation. *See* 478 U.S. at 313 ("court awarded fees are normally received long after the legal services are rendered"). Since plaintiff had no need to borrow, he incurred no financing costs.

[5] In an effort to make *Library of Congress* seem relevant, Fischbach traces its lineage back through *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976)—another sovereign immunity case—to *Myerle v. United States*, 33 Ct. Cl. 1 (1897). (Pet at 14-16.) But, *Myerle*, like *Library of Congress* and all the cases in between, is a sovereign immunity case. The Court of Claims in *Myerle* interpreted the statute in question as a bar to all claims against the United States for interest. 33 Ct. Cl. at 25 (citing Rev. Stat. § 1091, formerly 28 U.S.C. § 284, current version at 28 U.S.C. § 2516 (1996). *See Boston Sand and Gravel Co. v. U.S.*, 278 U.S. 41, 48 (1928)). The statute, in pertinent part, provided: "No interest shall be allowed upon any claim . . . by the Court of Claims." The plaintiff in *Myerle* had several claims against the United States and borrowed the amount of the claims from financial institutions while waiting for a judgment and asked that the interest paid on the loans be added to the judgment. *Id.* at 7-8. Whether or not his claim was the functional equivalent of prejudgment interest was not an issue and was never discussed. The Court of Claims inter-

- Similarly, in *Preston v. United States*, 776 F.2d 754 (7th Cir. 1985), the plaintiff did *not* claim he had incurred any interest obligations or other financing costs. Instead, the plaintiff sought "to recover for *the loss of the use of money*" or, in other words, plaintiff claimed only "prejudgment interest," which is barred by the FTCA. *Id.* at 760. Again, PG&E makes no claim for lost investment opportunities. PG&E's claim is for a wrongful increase in its actual financing costs. *Preston* has no bearing on whether PG&E ought to be allowed to recover actual financing costs it incurred as a direct and proximate result of the bid-rigging by defendants.

- In another case cited by Fischbach, *Marchese v. United States*, 781 F.Supp. 241 (S.D.N.Y 1991), the plaintiffs were "only seeking to recover the *interest they could have earned* on their certificates of deposit," in other words, a lost investment opportunity. 781 F.Supp. at 247 (emphasis added). They did *not* claim that they had increased financing costs as a result of the defendants' conduct, as PG&E does here.

- In *Southern Pacific Transportation Co. v. United States*, 471 F.Supp. 1186 (E.D. Cal. 1979), discussed by Fischbach (Pet. at 17), the plaintiff railroad was not permitted to recover damages to cover "the loss of use of corporate capital" which it "was forced to divert . . . away from other planned projects to costs

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preted § 1091 to sweep in all claims for interest without distinguishing between claims for actual financing costs or claims for prejudgment interest. And the Claims Court certainly did not consider whether the former was the functional equivalent of the latter. It did not consider such issues because it interpreted the statute as broad enough to bar any and all claims for interest. There is no similar statute at issue in the instant case. The 1980 Act addresses only prejudgment interest, that is, awards for the lost opportunity to invest a recovery.

and expenses resulting from the effect of the explosions." 471 F.Supp. at 1197. According to the railroad, this element of its damage claim represented "lost business opportunities," in other words, a lost investment opportunity. *Id.* at 1198. This differs from PG&E's claim for its actual financing costs, such as interest payments on borrowed money. While it is true, as Fischbach says (Pet. at 17), that the *Southern Pacific* court equated the railroad's damage claim to interest ("compensation for the loss of use of money is, by definition, interest," *id.* at 1197), it was interest that the plaintiff "could have earned," *Marchese*, 781 F.Supp. at 247, rather than interest *it actually paid to someone else (hence, an actual cost) as a result of defendant's conduct.*

- In footnote 3 of its petition, Fischbach invites the Court's attention to a handful of cases arising under the ADEA, False Claims Act, National Bank Act or RICO statute, which it argues demonstrate that "often" courts will rule that double and treble damage awards are a "substitute for incidental damages such as the time value of money" and accordingly deny requests for prejudgment interest. (Pet. at 8, n.3.) As one might surmise from Fischbach's carefully worded statement, it is equally true that "often" courts will reach the exact opposite result and grant prejudgment interest to compensate plaintiffs for the time value of money notwithstanding that the plaintiff's compensatory damages will be doubled or trebled automatically. *See, e.g., Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 281-282 (2d Cir. 1987) (prejudgment interest awarded in ADEA action notwithstanding doubling of compensatory damages); *Bonura v. Chase Manhattan Bank, N.A.*, 629 F.Supp. 353, 363-66 (S.D.N.Y. 1986) (same); *Criswell v. Western Airlines,*

Inc., 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) (ADEA action in which plaintiff was awarded prejudgment interest on compensatory damages as well as double compensatory damages); *Kelly v. American Standard*, 640 F.2d. 974, 982 (9th Cir. 1981) (same). The factors which seem to divide the courts involve such issues as whether the multiplication of compensatory damages is possibly compensatory itself or was legislated in order to serve punitive/detrimental goals. *Compare Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (an implicit, subsidiary purpose of ADEA multiple damages is to compensate plaintiff) *and Criswell*, 709 F.2d at 556-57 (ADEA multiple damages are punitive and intended to deter intentional violations).

We respectfully submit that the Court should decline Fischbach's invitation to detour into this thicket for a very good reason. All of the cases cited in Fischbach's footnote 3 and in this paragraph, whether or not they actually permit recovery of prejudgment interest, concern recovery for lost investment opportunities. Accordingly, they are far afield from the instant case which involves *only* actual financing costs PG&E incurred as a proximate result of the defendants' bid-rigging.

Fischbach's inability or unwillingness to accept the proper distinction between actual financing costs incurred by a plaintiff as a result of a defendant's conduct and interest that a plaintiff might have earned by investing money the defendant owed to plaintiff, if plaintiff had the money sooner, carries over into the antitrust cases upon which Fischbach relies:

- In *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), the plaintiff airline was denied "*moratory interest*" as an element of its damages. 449 F.2d at

80. But, moratory interest is merely interest that a plaintiff *could have* earned on money owed it by the defendant(s). *See Amoco Rocmount Co. v. Anschutz Corp.*, 873 F.Supp. 1492, 1497 (D. Wyo. 1994). PG&E has not asked to have moratory interest included in its damages. Rather, the Ninth Circuit has said that PG&E can ask for its actual financing costs in a retrial.

- *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), also involved a damage claim for the missed opportunity to invest money. As the dissent put it, "[d]uring all of the time [the case was active], the defendants held the stakes and earned interest" but "[i]f [plaintiff] had owned the Bulls, it would have possessed (and invested) the profits." *Id.* at 583-84. Again, a decision about that kind of damage claim does not address actual financing costs a plaintiff incurs as a proximate result of bid-rigging, much less hold that such costs have been excluded from compensatory damages in antitrust cases by Congress. Indeed, the *Fishman* court itself drew a sharp distinction between hypothetical costs and actual, out-of-pocket costs. *Id.* at 556 n.34.

- Similarly, *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), upon which the *Fishman* court relied, holds only that prejudgment interest "is not enumerated as a recoverable item" in the Clayton Act. 429 F.2d at 877. PG&E agrees, but the point is irrelevant because the decisions of the courts below in this case do not permit or even concern an award to PG&E of prejudgment interest. Fischbach petitions for relief from that part of the Ninth Circuit's decision that allows PG&E to seek recovery of actual financing costs.

- Finally, the same point distinguishes *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697 (1945) and *Cape Cod Food Products, Inc. v. National Cranberry Association*, 119 F.Supp. 900 (D. Mass. 1954), which cites and relies upon *Brooklyn Savings*. In *Brooklyn Savings*, the Court determined only that plaintiff was not entitled to recover interest on his damages due to the "delay in the payment of the basic minimum wages," that is, prejudgment interest. 324 U.S. at 715. Again, that is not the kind of damages sought by PG&E nor addressed by the courts below.

Thus, Fischbach has cited no cases which hold that actual financing costs are not recoverable. Moreover, the cases Fischbach does cite are no basis upon which to declare that bid-rigging conspirators shall henceforth be exempt from all responsibility for financing costs they have caused their victims to incur. Indeed, Fischbach can cite no cases on point because there is no logical or rational reason why courts should not treat actual financing costs like all other proximately caused effects of an antitrust violation and allow plaintiffs, who have actually suffered a measurable increase in financing costs as a result of a violation, to recover those costs as part of their direct damages, in keeping with traditional authority on antitrust damages. A plaintiff's actual financing costs can be ascertained to a satisfactory level of certainty and shown to have been proximately caused by an antitrust violation. This distinguishes prayers for actual financing costs from prayers for the "loss of use of money," "lost opportunities," "moratory interest," or "prejudgment interest," which are likely to be more conjectural and difficult to prove and in every instance do *not* involve recovery for actual financing costs.

In contrast to Fischbach's reliance on prejudgment interest cases, that is, lost investment opportunity, the courts below relied upon two cases directly on point and completely sup-

portive of the proposition that actual financing costs are recoverable. *See Minpeco S.A. v. Hunt*, 686 F.Supp. 420, 426 (S.D.N.Y. 1988); *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168 (S.D.N.Y. 1989) (same case); *United Power Ass'n, Inc. v. L.K. Comstock & Co.*, 1992-2 Trade Cas. (CCH) ¶ 70,055 (D. Minn. October 27, 1992). Fischbach's efforts to dismiss these cases as "wrongly-decided" (Pet. at 18-19) is inappropriate for the same reasons it is inappropriate to urge that the cases dealing with compensation for lost investment opportunity are relevant. Unlike Fischbach's cases, the *Minpeco* and *United Power* cases properly treat the issue of actual financing costs incurred as a proximate result of antitrust violations. They are not "wrongly-decided." (*Id.*) Moreover, they are not inconsistent with the result in the cases Fischbach cites because they consider a completely different issue.[6]

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[6] The extent to which *Minpeco* even addresses the issue of claims for prejudgment interest is limited, but definitely not helpful to Fischbach. The *Minpeco* court, 686 F.Supp. at 426-427, cites approvingly to *Bulk Oil, Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983), in which the Second Circuit found that it was not only appropriate for the plaintiff to recover its actual financing costs (interest payments on a loan from Chase Manhattan Bank), but prejudgment interest on its financing costs damages as well:

> Bulk was forced to make monthly interest payments to Chase [Manhattan Bank] . . . [W]e have ruled that [defendant] must reimburse Bulk for Bulk's monthly [interest] payments (and also pay Bulk statutory [prejudgment] interest on the monthly payments). . . .

697 F.2d at 485-486.

Thus, in *Bulk Oil* (decided after *TWA*) the Second Circuit by the simple act of awarding prejudgment interest on actual financing costs plaintiff was forced to pay to a bank by the defendant's wrongful conduct, made it clear that financing costs and prejudgment interest are two, very distinct concepts.

Fischbach's own discussion of *Bulk Oil* is exceptionally misleading. (Pet. at 11 and 19.) The relevant portion of the *Bulk Oil* decision holds that statutory prejudgment interest can and should be awarded on the actual financing costs a plaintiff is forced to pay to a lender on account

PG&E's claim is for its actual financing costs for the defendants' illegal overcharges; it is not a claim for lost investment opportunities, such as profit or interest that it might have earned if it had used equivalent cash for something other than paying for the defendant's illegal overcharges. Thus, once again, Fischbach has avoided confronting PG&E's actual claim that it cost PG&E money to raise the money to pay for the defendants' illegal overcharges. Simply because PG&E is not permitted, except under certain circumstances, to maintain a claim for a lost investment opportunity it could have earned if it had invested the money it paid to defendants for their illegal overcharges, does not mean that PG&E cannot recover the actual financing costs it was forced to incur as a result of the defendants illegal overcharges. That is the distinction

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of the defendant's wrongful conduct *in addition to* awarding plaintiff its actual financing costs. 697 F.2d at 484-486. Fischbach ignores this and instead, by carefully editing its quotations from, and constructing its descriptions of, *Bulk Oil* asserts completely the opposite—that the Second Circuit held that "statutory prejudgment interest would duplicate the award for interest payments on the loan." (Pet. at 19, n.8.) As textual support for its contrived interpretation of *Bulk Oil*, Fischbach offers this heavily edited quotation from the decision: " 'Having recovered its actual [financing payments on a loan that it would have paid off had the contract not been breached] . . . . [a]n award of statutory interest would amount to a double recovery.' " (Pet. at 11) (quoting *Bulk Oil* at 485).

Nothing could be further from the truth than Fischbach's description of *Bulk Oil*. The Second Circuit's precise statement in *Bulk Oil* was simply that "[a]n award of statutory [prejudgment] interest would amount to a double recovery." *Id.* at 485. But, the Second Circuit was *not* describing its decision to award plaintiff prejudgment interest on interest payments on the loan plaintiff obtained, as Fischbach suggests, but rather prejudgment interest on the principle sum of the loan. *Id.* It said "[a]n award of statutory [prejudgment] interest to Bulk on the part . . . of the contract price which Bulk would have used to pay off the loan would be a windfall." *Id.* at 486. As the Second Circuit rightly pointed out, had the defendant paid the full contract price, Bulk Oil would have immediately paid off the principle of its loan, hence the actual use to which Bulk Oil would put that portion of the damage award was actually known. *Id.* at 485.

which *Minpeco* and *United Power* make, but which Fischbach ignores.[7]

II. THE LEGISLATIVE HISTORY FISCHBACH CITES IS IRRELEVANT.

Fischbach's legislative history argument (Pet. at 24-26) suffers from the same flawed logic that taints the balance of its petition; it presupposes that PG&E's actual financing costs are a form of prejudgment interest and proceeds to argue that because Congress severely restricted the availability of pre-

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[7] At pages 11-13 of its petition, Fischbach indulges in a further mischaracterization when it excerpts selected portions of the testimony of Mr. Avram Tucker, PG&E's damage expert, and asserts that those excerpts show that Mr. Tucker implicitly admitted at trial that PG&E's claim for its financing costs is really a claim for "the loss of use of money over time, or prejudgment interest." (Pet. at 13.) To the contrary, Mr. Tucker's testimony was quite clear. He testified that PG&E financed 100% of the cost of constructing Diablo Canyon and that he performed two separate analyses to determine a range of actual finance costs incurred by PG&E as a result of the illegal overcharge. (Pet. at 11-12.) One analysis involved PG&E's weighted average cost of capital. (Pet. at 12). The other analysis was based entirely on a study of PG&E's debt with absolutely no inclusion of any lost investment opportunity. (*Ibid.*)

Fischbach emphasizes that the way Mr. Tucker calculated financing costs "is similar to a method commonly used to calculate prejudgment interest in patent cases." (Pet. at 12.) That may well be, but it is irrelevant. The fact that prejudgment interest might be calculated based on a plaintiff's borrowing costs, as Fischbach's patent cases say, does not turn a plaintiff's borrowing costs into prejudgment interest. They may both be calculated by multiplying an interest rate or rates by a time period and a dollar amount, but they represent something quite different (*see* pages 5-14, *supra*), contrary to Fischbach's assertion (Pet. at 4) ("interest by any other name is still interest."). Although interest by any other name may be interest, Fischbach's statement overlooks the fact that there is a difference between earnings, such as interest gained by a plaintiff from an investment opportunity, and interest paid to a third-party by the plaintiff. The former represents income, the other a cost, or outflow. PG&E is seeking only to recover its acutal financing costs and not a lost investment opportunity.

judgment interest awards by enacting the 1980 Act, Congress also intended to restrict severely a plaintiff's ability to recover its actual financing costs incurred as a result of anti-competitive behaviour. As discussed in detail above, equating prejudgment interest, that is, a lost investment opportunity, with PG&E's actual financing costs for Diablo Canyon is simply wrong. Moreover, nothing in the history of the 1980 Act supports Fischbach's argument that the two are synonymous.

By adopting the 1980 Act, Congress sought to control the conduct of antitrust litigation by requiring litigants to pay prejudgment interest from the date of service of the complaint to the judgment, if they were found to have engaged in dilatory tactics. *See* H.R. 96-875 at 2-3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2766, 2767-2768. Accordingly, its consideration of the bills that evolved into the 1980 Act did not require an analysis of whether prejudgment interest was in effect a substitute for actual financing costs.

A thorough review of all available Congressional materials related to the 1980 Act reveals no discussion of the issue of actual financing costs, such as interest on loans, before or during litigation[8] and evinces no Congressional intent to

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[8] Fischbach argues that a Congressional intent to preclude recovery of actual finance costs can be gleaned from a Report of the House Committee on the Judiciary stating that small business plaintiffs are "denied use of [their] money during the litigation with no adjustment for inflation or the interest cost of borrowing money elsewhere." *(See* Pet. at 24 [*citing* H.R. Rep. No. 96-875 at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2766, 2767].) The statement in question is taken out of context. It comes from a paragraph which addresses only the topic of "awarding prejudgment interest," or lost investment opportunity. Fischbach, however, tries to turn it into a reference to a plaintiff's actual financing costs. (Pet. at 24.) In fact, the passage expressly refers only to the "*defendant's* interest-free use" of *plaintiff's* money "with no adjustment" for plaintiff of "the interest cost [to defendant] of borrowing money elsewhere" during the pendency of the action. 1980 U.S.C.C.A.N. *supra*, at 2767. In other words, prior to the passage of the 1980 Act, a dilatory defendant could force the plaintiff to be his interest-free lender for as long as defendant could delay the final resolution of the litigation.

restrict an antitrust plaintiff's ability to recover, for example, interest it was forced to pay lenders in order to raise cash to pay an inflated, bid-rigged price to a conspirator.[9]

Fischbach's argument regarding the legislative history of the National Cooperative Research Act of 1984 (Pub. L. No. 98-462, 98 Stat. 1815 (1984)) (the "1984 Act") is equally faulty. The 1984 Act limited damages awarded to a successful plaintiff bringing an antitrust case challenging a joint research and development ("R&D") venture to actual rather than treble damages. 15 U.S.C.A. § 4303(a) (West Supp. 1996). The intent of the 1984 Act was to address the concern that the potential for treble damage antitrust actions chilled critical joint research and development projects. *See* S. Rep. No. 98-427, at 1-2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105, 3105-3106. Because the damages under the 1984 Act are not trebled, Congress provided that an injured party may collect prejudgment interest from the earliest date (within the statute of limitations) that injury can be established to judgment. *See* 15 U.S.C.A. § 4303(a) (West Supp. 1996). Again,

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An award of prejudgment interest would allow a plaintiff to be compensated at the *defendant's* "interest cost of borrowing money elsewhere" rather than be an involuntary interest-free lender. (*Ibid.*) Once the statement is viewed in its proper context, it is obvious that the discussion cited by Fischbach has nothing to do with a *plaintiff's* cost of borrowing or other financing costs.

[9] *See, e.g., Antitrust Procedural Act of 1979: Hearings on S.390 Before the Subcomm. on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 96th Cong. 30 (1979) (testimony of Honorable Charles B. Renfrew, U.S. District Judge) (discussing "the investment value of the money to be awarded" but never mentioning whether plaintiff's out-of-pocket financing costs should be included in the award.); *Id.* at 50 (testimony of Peter M. Gerhart, Ohio State Univ. law professor) ("The true justification for this amendment, it seems to me, is that when a defendant injures a plaintiff monetarily, the plaintiff is deprived of the use of money and thus of the interest he could have earned." There is no mention of whether a plaintiff's increased financing costs should properly be considered an injury.)

nothing in the Congressional discussion has any relevance whatsoever to the issue before the Court and Fischbach's reference to it should be discounted entirely.

III. FISCHBACH'S REASONS FOR REQUESTING A WRIT ARE SPECIOUS.

Fischbach's efforts to alarm the Court by its petition are specious. It claims that allowing PG&E to recover both prejudgment interest and treble damages involves an issue of exceptional importance. (Pet. at 27-28.) Maybe it would, if that were what the Ninth Circuit had decided. But, the court below decided something completely different. It simply ordered that on retrial PG&E could not be summarily precluded from introducing evidence of its actual financing costs for the illegal overcharges it paid, whatever financing tool it used. (App. at 18a.)

Fischbach also tries to alarm this Court by claiming that allowing PG&E to recover the increase in its actual financing costs as damages would allow antitrust plaintiffs to expand the amount of their damages "exponentially." (Pet. at 21.) However, damages are damages, no matter how large or small. They will not expand exponentially or otherwise by virtue of the Ninth Circuit's decision. An antitrust plaintiff has always been entitled to seek full recovery for all losses proximately caused by a defendant's violation. The Ninth Circuit's opinion does not purport to change that principle at all. Furthermore, the fact that a utility's financing costs associated with the construction of a nuclear plant may be very significant does not suggest that other antitrust plaintiffs have financing costs on a similar scale.

Regardless of the scale of a plaintiff's cost-of-capital, there is never a windfall that results from its recovery, as Fischbach intimates. (Pet. at 25.) Fischbach's suggestion that it is a windfall is premised on its notion that PG&E's actual financing costs are identical to prejudgment interest, that is, a lost

business opportunity. Whether or not prejudgment interest can be fairly called a windfall, recovery of a plaintiff's actual financing costs is not the equivalent of prejudgment interest. *See* pages 5-14, above. Thus, there is no reason for Fischbach to cry wolf. Indeed, if there is a windfall in the offing for anyone, it will go to Fischbach, which is trying to avoid paying for all of PG&E's damages. Furthermore, Fischbach's pious concern that allowing PG&E to recover its financing costs will somehow be harmful to economic activity in the United States is utterly ridiculous. The Ninth Circuit did not change any established law of damages, it simply followed a long-established principle that a plaintiff can recover all financing costs proximately caused by an antitrust violation.

Finally, Fischbach's suggestion that a writ should issue because there is a conflict between the Ninth Circuit's unpublished memorandum decision and all the cases Fischbach relies upon, thus making the issue one of considerable significance is also specious. (Pet. at 27-28.) There is no conflict between any of the cases cited by Fischbach and the Ninth Circuit's memorandum opinion because Fischbach's cases do not address the issue the Ninth Circuit's opinion addresses. Moreover, the doomsday scenario which Fischbach predicts will occur as a result of the Ninth Circuit's memorandum opinion is pure fantasy. The *Minpeco* court reached the same result, eight years ago and the analogous *Bulk Oil* decision is even older. If Fischbach's prediction were correct, the dire consequences would have occurred by now. But, they have not.

CONCLUSION

The rationale offered by Fischbach for issuing a writ was also offered by Fischbach to the courts below, citing all the same cases. It was properly rejected before and it has not improved with age. As the *Minpeco* and *United Power Ass'n.* decisions made clear, prejudgment interest and its functional equivalents like "moratory interest" or "loss of the use of money" or "lost opportunity costs" are not the same as a claim for actual financing costs incurred by a plaintiff, which if proximately caused by a violation should be recoverable. Because the memorandum decision issued by the Ninth Circuit follows traditional damage principles and contradicts no known reported case, a writ is not necessary.

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